* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ FAO No.163/2003

% Date of Decision : 23rd of November, 2007

\# NATIONAL INSURANCE COMPANY LTD. .....Appellant

! Through : Mr. L.K. Tyagi, Adv.

versus

$

DHARAMPAL & ORS. .....Respondents

^ Through : None for respondent No.1
Mr. S. Sirish Kumar, Adv. for respondent No.2

* CORAM:
HON'BLE MR. JUSTICE B.N. CHATURVEDI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

: **B.N.CHATURVEDI, J.**

1. This appeal arises out of an order dated 2nd January, 2003 of the Commissioner Workmen's Compensation awarding an amount of Rs.4,35,288/- in favour of respondent No.1 for having suffered

permanent total disability in the course of his employment as driver on a truck owned by respondent No.2.

2. The respondent No.1 worked as a driver with respondent No.2 on his truck bearing No.DL-IGB-2809. On 21st July, 2001 he was proceeding on the said truck from Delhi to Baroda. At about 5.30 p.m. on that date, on reaching a place near Dadu, Jaipur (Rajasthan) he parked his truck by the road side and started crossing the road to go to the other side to take refreshment when he was knocked down by a speeding moped resulting into injuries all over his body including head. He was rushed to a government hospital and later removed to Mata Chanan Devi Hospital, Delhi. On account of head injury he was rendered mentally disabled to work as a driver. Such disability was to the extent of 100%. On the relevant date the respondent No.1 was 35 years of age and was drawing wages to the tune of Rs.3,000/- plus Rs.50/- per day as allowances. The vehicle in question was at the relevant time insured with the

appellant and an additional premium for liability under Workmen's Compensation Act had been charged by it.

3. The respondent No.1 could not be served with notice of appeal in ordinary course. He was ultimately served by publication. He however, did not cause his appearance either in person or through counsel. It was respondent No.2 alone who, on being served with notice, contested the appeal.

4. In his reply to the claim application, the respondent No.2 admitted that respondent No.1 was in his employment as a driver on the vehicle in question on the relevant date and time and that he was drawing wages @ Rs.3,000/- plus Rs.50/- per day as allowances. He also admitted that the accident as stated by respondent No.1 in his claim application did take place on 21st July, 2001 while he was on duty as driver on the said vehicle.

5. The appellant contested the claim on the grounds that as the head injury resulting into alleged 100% disablement to respondent No.1 did not

arise out of use of the insured vehicle, no liability could be fastened on the appellant under Workmen's Compensation Act. It was further pleaded that the finding of 100% permanent disablement being not based on any admissible medical evidence, the impugned order is liable to be set aside.

6. I have heard learned counsel on either side.

7. Learned counsel for the appellant assailed the impugned order on the ground that under the motor vehicle policy no liability under Workmen's Compensation Act could be created against the insurer unless the death or bodily injury to a workman is caused by or arises out of use of the insured vehicle in a public place. He contended that since the head injury to respondent No.1 resulting into alleged 100% permanent disablement did not arise out of use of the insured vehicle, the appellant could not be held liable to indemnify respondent No.2 for his liability towards respondent No.1 under the Workmen's Compensation Act. According to the learned counsel, in the facts of the given case, it is

respondent No.2, being owner of the vehicle, who alone would be liable to compensate the respondent No.1.

8. Further, it was argued that the respondent No.1, in the course of his evidence, did not produce any medical evidence in support of his plea that the head injury suffered by him has resulted in alleged 100% permanent disablement. It was pointed out that a medical certificate was filed by the respondent No.1 with his written arguments only which was not got proved by examining the doctor concerned. The Commissioner, Workmen's Compensation was, in the circumstances, contended the learned counsel, not justified in taking judicial note of such medical certificate. Moreover, it was contended, the medical certificate did not specify the percentage of disability, if any, suffered by respondent No.1 on account of head injury and thus the Commissioner Workmen's Compensation could not have based his finding of 100% permanent disablement on the medical certificate so filed. A Single Bench decision

of Andhra Pradesh High Court in **Oriental Insurance Company Ltd. Vs. Koningi Kondal & Ors.**; I (2001) ACC 232 was referred to lend assurance to his plea that since the respondent No.1 failed to examine the doctor concerned, who had issued the certificate in question, such certificate could not have been taken judicial note of.

9. On behalf of respondent No.2 it was argued with reference to proviso to Section 147 (1) of the Motor Vehicles Act requiring a motor vehicle policy thereunder to cover liability in respect of the death or bodily injury to an employee arising under the Workmen's Compensation Act, out of and in the course of his employment while engaged in driving a vehicle, it was contended that under Section 167 of the Motor Vehicles Act where death or bodily injury to a person gives rise to a claim for compensation under that Act and also under the Workmen's Compensation Act the person entitled to compensation has the option to claim compensation under either of the two Acts but not under both.

Learned counsel for respondent No.2 submitted that in the present case as the liability of the appellant to compensate respondent No.1 arose in terms of motor vehicle policy under Motor Vehicles Act as also under the Workmen's Compensation Act, the respondent No.1 opted for the one under Workmen's Compensation Act by filing a claim application before the Commissioner Workmen's Compensation. Learned counsel for respondent No.2, to fasten the liability on the appellant to compensate respondent No.1 particularly referred to IMT. 28. LEGAL LIABILITY TO PAID DRIVER AND/OR CONDUCTOR AND/OR CLEANER EMPLOYED IN CONNECTION WITH THE OPERATION OF INSURED VEHICLE of the Motor Vehicle Policy as also schedule of premium to point out that the appellant had apart from basic premium, charged an additional premium to indemnify respondent No.2 against the legal liability under the Workmen's Compensation Act, 1923 in respect of personal injury to any paid driver whilst engaged in the service of the insured in such

occupation in connection with the insured vehicle.

10. In the context of first ground of challenge to the impugned order no doubt causal relationship between the use of the motor vehicle and the accident resulting in alleged permanent disablement to respondent No.1 was not direct and proximate, the accident was nevertheless connected with the use of the motor vehicle in question. In **Shivaji Dayanu Patil & Anr. Vs. Vatschala Uttam More (Smt);** (1991) 3 SCC 530 interpreting the expression "Arising out of" occurring in Section 92-A of the Motor Vehicles Act, 1939 the Supreme Court says :

> "This would show that as compared to the expression "caused by", the expression "arising out of" has a wider connotation. The expression "caused by" was used in Sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In Section 92-A, Parliament however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation under Section 92-A, the casual relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need

> not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in Section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

11. In a later decision in **Smt. Rita Devi & Ors. Vs. New India Assurance Co. Ltd.**; AIR 2000 Supreme Court 1930 the law as laid down in Shivaji Dayanu's case (supra) finds reiteration. It was a case where an auto rickshaw registered as a public carrier vehicle, was hired by some unknown passengers. Later, the said auto rickshaw was reported stolen and the dead body of driver of that auto rickshaw was recovered by the police on the next day. The auto rickshaw however, could not be recovered and the claim of the owner for the loss of auto rickshaw was accepted by the insurance company and settled amount for loss suffered by the owner was paid to him. For the death of the driver on a claim for compensation being filed, the Motor Accident Claims Tribunal, in ultimate analysis, held the insurance company liable to compensate for death of driver. Accordingly, the

Tribunal awarded a sum of Rs.2,81,500/- against the insurance company with interest @12% per annum from the date of application till payment. On an appeal being preferred before the High Court by the insurance company, the Tribunal's decision was reversed holding that as it was a case of murder and not of accident, a claim petition under the Motor Vehicles Act would not lie. In appeal against such an order of the High Court, the learned counsel appearing for the insurance company sought to support the judgment of the High Court by contending that on the facts of the case the death of the driver of the auto rickshaw was caused by felonious acts of certain unknown persons and the same was not caused by an accident arising out of the use of the vehicle. This argument however did not find favour with the Supreme Court and the same was negatived. It was held on facts of that case that the murder of the deceased auto rickshaw driver was attributable to an accident arising out of the use of motor vehicle and therefore the claimants were

entitled to compensation as claimed by them. Here in the present case, the respondent No.1 happened to be at the site of accident in the course of his employment as driver of the insured vehicle. Even though the head injury resulting into alleged 100% permanent disablement to him was caused by an accident with a moped, causal relationship between the use of insured vehicle and such accident even though not direct and proximate, the accident was very much connected with the use of the insured vehicle. There would thus appear no merit in the argument that the appellant did not incur any liability to compensate respondent No.1 in view of the fact that the accident resulting into alleged 100% permanent disablement did not arise out of use of the insured vehicle and the same is therefore unacceptable.

12. As far as the other ground of challenge is concerned, it is noticed that respondent No.1 had adduced evidence in support of claim by way of his affidavit. Apart from his own statement on affidavit,

the respondent No.1 appears to have had produced no medical evidence to prove that he suffered 100% permanent disability for the purpose of his employment as a driver. A medical certificate dated 9/16th March, 2002 from one Dr. Munish Aggarwal of Mata Chanan Devi Hosptial, Delhi is there on record which reads thus :

" **TO WHOM SO EVER IT MAY CONCERN**

This is to certify that Sh. Dhram Pal S/o Sh. Kashi Ram Age 35 years, is not fit for driving any vehicle as he suffering from head injury.

(DR. MUNISH AGGARWAL)
CONSULTANT"

This certificate was filed by the respondent No.1 with his written arguments only. The doctor concerned issuing the said certificate was not examined by the respondent No.1 to prove the same and thus the appellant did not get an opportunity of cross examining that doctor in regard to the nature and extent of disablement of respondent No.1 on account of his head injury. In the circumstances, Commissioner Workmen's Compensation was not

justified in taking into account and basing his finding of 100% permanent disablement to the respondent No.1 on the said medical certificate. The impugned order is, in the circumstances, liable to be set aside on this count.

13. In the result, the appeal is allowed and the impugned order dated 2nd January, 2003 of the Commissioner Workmen's Compensation is set aside. The case is remanded to the Commissioner Workmen's Compensation with a direction to require the respondent No.1 to examine the doctor concerned issuing the medical certificate dated 16th March, 2002 and/or to produce any other evidence to prove the nature and extent of disablement, if any, on account of his head injury. On such evidence being produced, the Commissioner Workmen's Compensation would proceed to decide the claim application afresh in the light of admissible evidence on record. The record of Commissioner Workmen's Compensation shall be sent back immediately with a copy of this order for further proceedings, as

aforesaid.

(B.N.CHATURVEDI)

November 23, 2007 JUDGE

sa